

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-982

COMMONWEALTH

vs.

SAMUEL E. WILES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Samuel E. Wiles, appeals from an order of a District Court judge revoking his probation and imposing a sentence of two and one-half years in the house of correction, with ninety day to serve and the balance suspended for two years. The judge concluded that the defendant had violated a condition of his probation by committing a new offense. On appeal, the defendant argues that the judge abused his discretion in finding him in violation of his probation because the only evidence presented was unreliable and untrustworthy hearsay contained within a police report. The defendant He also argues that the judge abused his discretion in continuing the probation violation hearing when the victim (who was not summonsed) did not appear, and that trial counsel provided

ineffective assistance when he withdrew his objection to the continuance. We affirm.

Background. On November 6, 2015, the defendant pleaded guilty to assault and battery, and was sentenced to one year of probation. On November 7, 2016, he was served with a notice of probation violation and hearing, which alleged that he committed a new criminal offense of assault and battery.<sup>1</sup> The incident was investigated by Barnstable Police Officer Daniel Nugent, who wrote a report. A probation violation hearing was scheduled for January 25, 2017. However, because no employee of the probation department failed to summons her, the victim did not appear. As a result, the hearing was eventually continued to February 24, 2017.

The victim was summonsed by an employee of the probation department to appear on February 24, 2017, but she did not do so. At the commencement of the hearing, the probation officer reported to the judge that the victim had telephoned the assistant chief probation officer on February 3, 2017, and stated that she did not want to testify against the defendant or want the defendant to go to jail. She also requested that the stay-away order imposed against the defendant be lifted. The probation officer further related that although Officer Nugent

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<sup>1</sup> The defendant was arrested for the new offense the day before his probation was to terminate.

had been summonsed, he also was not available to testify. The probation officer explained that Officer Nugent was on administrative leave because he was "being investigated for something." The probation officer then informed the judge that the probation department would proceed solely on the basis of Officer Nugent's police report.

The report recounted that on November 3, 2016, at 2:46 A.M., Officer Nugent responded to an address in Hyannis to investigate a report of a domestic incident. When Officer Nugent arrived, he spoke with the victim, who told him that she had an argument with her boyfriend, whom she identified as "Samuel Foster." The victim stated that the argument became physical and that the defendant "grabbed a kitchen steak knife and poked her in the forehead with it." The defendant then "took off on foot." Officer Nugent observed "some minor marks on [the victim's] forehead with a small drop of blood." The victim declined to seek an emergency restraining order.

The report continued: "A short time later [the defendant] called 911 stating that he was staying at a friend's house and did not wish to talk to an officer at this time, but that he would come to the station in the morning." The police located the defendant by a "[global positioning system] ping" from his cell phone and arrested him.

The defendant objected to the admission of the police report and, after the probation department rested, moved to dismiss arguing that the report contained unreliable hearsay. After the motion was denied, the defendant called as a witness Attorney Susan Crocker, who had represented the defendant in the underlying case. She testified that the victim had telephoned her to discuss the defendant's case. During the conversation, the victim identified the defendant by the name of "Foster," and said: "You know, I don't know why he's being charged. He didn't do anything. He wasn't even here. I was drunk. I don't know what I said to the police. I don't know why I said it to the police."

At the conclusion of the hearing, the defendant again asserted that the evidence was inadequate to prove a violation because the hearsay statements attributed to the victim were not substantially reliable. The judge concluded otherwise and found the defendant in violation of his probation, reasoning that the police report was "credible."

Discussion. a. Adequacy of the evidence. "A determination whether a violation of probation has occurred lies within the discretion of the hearing judge. . . . The Commonwealth must prove a violation of probation by a preponderance of the evidence." Commonwealth v. Bukin, 467 Mass. 516, 519-520 (2014). While a judge may consider reliable

hearsay at the hearing, "[u]nsubstantiated and unreliable hearsay cannot . . . be the entire basis of a probation revocation." Commonwealth v. Durling, 407 Mass. 108, 118 (1990). Where, as here, hearsay is the only evidence of a violation, "the indicia of reliability must be substantial" to overcome the defendant's interest in cross-examining the actual source. Id.

The defendant contends, as he did at the hearing, that the victim's hearsay statements set forth in Officer Nugent's report are inherently unreliable.<sup>2</sup> In assessing whether hearsay evidence is substantially trustworthy and reliable, a judge may consider "whether that evidence (1) is based on personal knowledge and/or direct observation, rather than on other hearsay; (2) involves observations recorded close in time to the events in question; (3) is factually detailed, rather than generalized and conclusory; (4) is internally consistent; (5) is corroborated by any evidence provided by the probationer; (6) was provided by a disinterested witness; or (7) was provided under circumstances that support the veracity of the source." Rule 7 (b) of the District/Municipal Court Rules for Probation Violation Proceedings, Massachusetts Rules of Court, at 679

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<sup>2</sup> The fact that Officer Nugent was on administrative leave and "being investigated for something" at the time of the hearing has no bearing on our analysis. Absent more information, there is no basis for concluding that Officer Nugent's credibility was somehow undermined, as the defendant suggests.

(Thomson Reuters 2019). Accord Commonwealth v. Patton, 458 Mass. 119, 132-133 (2010). These criteria are nonexclusive, and "[t]here is no requirement that hearsay satisfy all the above criteria to be trustworthy and reliable." Id.

We acknowledge that the victim's statements were not overly detailed. However, upon consideration of all the factors described above, we conclude that the statements were substantially reliable and therefore the evidence was adequate to support the judge's determination that the defendant had violated a condition of his probation.<sup>3</sup> To begin with, the victim's statement that the defendant poked her in the forehead with a knife was based on personal knowledge and corroborated by Officer Nugent's observation, noted in his report, that the victim had some minor marks and a drop of blood on her forehead. The victim's statement that the defendant fled was corroborated by his call to the police reporting that he was staying at a friend's house and did not wish to talk to the police that evening. The presence of some blood supported the inference that the victim reported the assault soon after it occurred. "In addition, it is a criminal offense to make a false report of a crime to a police officer. See G. L. c. 269, § 13A. This factor 'bolsters the reliability of the report[].'"

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<sup>3</sup> We note the judge did not explicitly state that he found the hearsay evidence substantially reliable or make written findings to that effect, as he should have.

Commonwealth v. Nunez, 446 Mass. 54, 59 (2006), quoting Durling, 407 Mass. at 121. Finally, the defendant's call to the police, stating that he would go to the police station the next morning, provided some evidence of consciousness of guilt.

Lastly, we note that the fact that the victim referred to the defendant by his alias, Samuel Foster, rather than his true name, Samuel Wiles, is of no consequence. Identity was not contested at the hearing. In addition, the record contains independent evidence connecting the defendant with the name Samuel Foster: (1) the defendant's arrest record, which we presume was available to and reviewed by the judge,<sup>4</sup> indicates that Samuel Foster was an alias used by the defendant, and (2) Attorney Crocker identified the name Foster as the defendant's "other name" during her testimony at the hearing.

b. Continuance. The defendant argues that the judge erred when he continued the hearing from January 25 to February 24 without stating his reasons for doing so on the record, as required by Rule 6 (e) of the District/Municipal Court Rules for Probation Violation Proceedings, Massachusetts Rules of Court.<sup>5</sup> There is no merit to this argument. Contrary to the defendant's

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<sup>4</sup> The arrest record appears to be part of the police report.

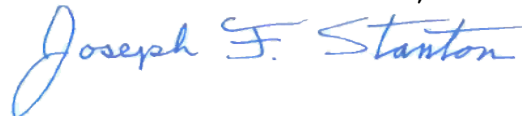
<sup>5</sup> Rule 6 (e) reads, in pertinent part: "Probation violation hearings shall be continued only by a judge and only for good cause shown. The reason for any continuance shall be stated by the judge and set forth on the record. No continuance shall be ordered other than to a date certain and for a specific purpose, and as provided in Rule 8(a)."

assertion, it is clear from the record that the judge continued the hearing for a specific purpose: to give the probation department the opportunity to summons the victim. Thus, the judge effectively complied with rule 6 (e).

The defendant also claims that trial counsel was ineffective because he withdrew his objection to the continuance. This argument is likewise unavailing. It suffices to note that the defendant has failed to demonstrate that the continuance deprived him of a substantial ground of defense where both he and the probation department were in the exact same position in February as they were in January. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974) (to establish ineffective assistance of counsel, defendant bears burden to show counsel's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer," and if so found, that it deprived him of "an otherwise available, substantial ground of defence").

Order revoking probation and  
imposing sentence affirmed.

By the Court (Vuono,  
Ditkoff & Wendlandt, JJ.<sup>6</sup>),



Clerk

Entered: August 15, 2019.

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<sup>6</sup> The panelists are listed in order of seniority.